

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN R. KINCAID,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION,

Defendant.

CA No. 04 CV 11522 WGY

AFFIDAVIT OF SIOBHAN SWEENEY, COUNSEL FOR DEFENDANT

Now comes Siobhan Sweeney, who deposes and swears as follows:

1. My name is Siobhan Sweeney. I am attorney with the firm of Edwards & Angell, LLP and I am counsel of record for Bank of America Corporation, Defendant in the above-captioned matter.

2. Attached hereto in connection with Defendant's Statement of Material Facts In Support Of Its Motion For Summary Judgment, are the following exhibits:

Exhibit A Excerpts of the depositions of Sheila K. Burroughs

Exhibit B Affidavit of Sheila K. Burroughs

Exhibit C Excerpts of the deposition of Steven R. Kincaid

Exhibit D Excerpts of the deposition of Alec Kotopoulos

Exhibit E Excerpts of the deposition of Eric A. Montgomery

Exhibit F Complaint and Jury Demand

Exhibit G Correspondence and Notice of Right to Sue from Equal Employment Opportunity Commission.

Signed under the penalties of perjury, this 21st day of October, 2005.

/s/ Siobhan Sweeney

Siobhan Sweeney

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 04-11522-WGY

STEVEN R. KINCAID,

PLAINTIFF,

VS.

BANK OF AMERICA
CORPORATION,

DEFENDANT.

DEPOSITION

OF

SHEILA K. BURROUGHS

AT CHARLOTTE, NORTH CAROLINA

JUNE 1, 2005

REPORTER: IRA ANDERSON
NOTARY PUBLIC

COPY



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Charlotte, NC
28247

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Ms. Burroughs - Vol. I

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1 A. (Witness examines document.)

2 Q. Okay. Now, that paragraph, in that paragraph
3 you seem to be saying that Bank of America
4 began attempting to fill the market
5 information position ultimately occupied by
6 Mr. Kincaid in January 2001. Do you see that?

7 A. I do.

8 Q. Okay. Is that correct?

9 A. I don't think it's correct for the position
10 ultimately filled by Mr. Kincaid.

11 Q. Okay. All right. What position was the bank
12 trying to fill in January 2001?

13 A. We filled a number of positions, similar
14 positions.

15 Q. Okay. So is essentially what you're saying
16 here that the bank enlisted the services of
17 Management Recruiters International to fill a
18 number of market information positions?

19 A. That is true.

20 Q. Okay. When was it that the bank first started
21 to make efforts to fill the position, the
22 particular position that was ultimately filled
23 by Mr. Kincaid?

24 A. I believe it was in February or March.

25 Q. Of 2002?

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1 A. Yes.

2 Q. Okay. Who made the decision that the bank
3 needed to hire somebody with the skills that
4 Mr. Kincaid had?

5 A. I and Vipin Mayer --

6 Q. Okay. And --

7 A. -- and his leadership team.

8 Q. Okay. And you, you and Mr. Mayer decided that
9 the bank needed somebody in February, March
10 2002?

11 A. Yeah. Keep in mind though, we had a number of
12 different job descriptions over a period of
13 time as the reorganizations that I was
14 describing to you occurred.

15 Q. Okay.

16 A. So the position as it was envisioned and the
17 way that we filled it was an ongoing evolution
18 based on the reorganizations we were having at
19 the time.

20 Q. Okay. When you first, when you had your first
21 contact with Mr. Kincaid, did the particular
22 qualifications that he had match up with what
23 you had been looking for?

24 A. They appeared to match fairly well.

25 Q. Okay. What was it that you had been looking



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Ms. Burroughs - Vol. I

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1 for?

2 A. A consultant.

3 Q. Okay. And what characteristics in a
4 consultant were you looking for?

5 A. Someone who had the ability to think
6 strategically, with marketing research
7 experience, customer satisfaction measurement
8 experience, the ability to influence other
9 people, and work collaboratively at a senior
10 level.

11 Q. Now, none of the things that you just
12 mentioned included a knowledge of statistics.

13 A. No. Statistical knowledge was a bonus. The
14 primary skill is marketing research skill
15 which, in and of itself, includes some level
16 of statistics.

17 Q. Okay. Before Mr. Kincaid started to work for
18 the bank, did you have any conception of what
19 you were going to ask him to work on?

20 A. Yes.

21 Q. And what conception did you have?

22 A. He would be a primary member of a small team
23 and would be responsible for, the idea was he
24 would be responsible for facilitating and
25 leading a community of practice, he would

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1 develop and enforce standards for customer
2 satisfaction and research measurement across
3 the company, would participate with the team
4 in strategic analysis of the various studies
5 that we had access to, and would synthesize
6 that learning into presentation for senior
7 management, and would participate with the
8 evaluation community of practice. The
9 community of practice he was intended to lead
10 was the customer satisfaction community of
11 practice. There were more than one, so to
12 lead the one and participate fully in the
13 other.

14 Q. Now, were those things that you just
15 mentioned, were they committed to writing?

16 A. The job description had, I think, some
17 examples of that type of thing in it, but I
18 don't recall specifically what was in the job
19 description. Typically, we don't list the
20 tasks in the job description.

21 Q. All right. And who prepared the job
22 description?

23 A. I did, working with my personnel recruiter.

24 Q. And who was the personnel recruiter you were
25 working with?

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1 A. Kim Heenan.

2 Q. All right. Now, when was the first time you
3 had any communication with Mr. Kincaid?

4 A. I don't remember.

5 Q. Did you have contact with him by phone before
6 you met him in person?

7 A. Yes.

8 Q. Do you recall anything about the contact you
9 had with him by phone?

10 A. I had a brief screening phone interview with
11 him.

12 Q. Okay. And do you remember anything about that
13 screening phone interview?

14 A. Nothing particular.

15 Q. Okay. I mean, did you have a practice as to
16 the kinds of things that you covered in a
17 screening phone interview like that?

18 A. Typically, yes.

19 Q. What was your practice?

20 A. Typically, I would ask what experience they
21 have regarding the particular discipline, in
22 this case, customer satisfaction research.
23 Also, I asked about philosophy of the best way
24 to measure customer satisfaction and the best
25 way to ensure that you have consistency across

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1 multiple groups in doing so.

2 Q. Okay. And was the information that you got
3 from Mr. Kincaid in that telephone interview
4 satisfactory to you?

5 A. He appeared to have the relevant experience,
6 yes.

7 Q. Okay. And so after that, sometime after that,
8 arrangements were made for Mr. Kincaid to come
9 to Charlotte to be interviewed?

10 A. Yes.

11 Q. Okay. And you interviewed him in person at
12 that time?

13 A. Yes.

14 Q. Do you recall whether anybody else interviewed
15 him?

16 A. Yes.

17 Q. Who else interviewed him?

18 A. He interviewed with Rick McFarland, Chuck
19 Andrews.

20 Q. Anyone else?

21 A. There were more, but I'm not really sure of
22 who else.

23 Q. Who decided who was going to interview
24 Mr. Kincaid?

25 A. I worked with a recruiter to determine who



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1 should.

2 Q. Okay. Why did you decided that Rick McFarland
3 should interview him?

4 A. Rick was a relevant member of our team at the
5 time who also would be interfacing very much
6 with this person, whoever was hired.

7 Q. Okay. And did Rick McFarland have any
8 knowledge about statistics?

9 A. Yes.

10 Q. Okay. Was that one of the reasons why you
11 included him as one of the people to interview
12 Mr. Kincaid?

13 A. No.

14 Q. Okay. Chuck Andrews, why did you have Chuck
15 Andrews interview Mr. Kincaid?

16 A. Chuck was also one of my peers who was on the
17 marketing research side. Our standard
18 practice was to have several of peers at my
19 level interview a candidate, and then also I
20 believe he might have interviewed with Alison
21 because we usually have them interview with at
22 least one of the people that reported to me as
23 well.

24 Q. One of the people that --

25 A. That reported to me, that would be his



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1 teammate.

2 Q. Okay. And so, and that person was whom?

3 A. I think it was Alison in this case, because
4 she lived in Charlotte.

5 Q. Alison?

6 A. I think he also had a phone interview with
7 Susan. But you're asking about the in-person
8 ones, Susan was not in-person.

9 Q. Okay.

10 A. He would have also interviewed with the
11 recruiter that day, or at least interacted
12 with her.

13 Q. Okay. After these interviews were conducted,
14 did you consult with the various people who
15 had interviewed Mr. Kincaid?

16 A. Yes.

17 Q. And what kind of feedback did you get from
18 them about Mr. Kincaid as a potential
19 employee?

20 A. His skills appeared to be very strong, his
21 experience appeared to be in the right areas,
22 he appeared to have good opinion regarding
23 customer satisfaction, and well
24 thought-through ideas about ways to measure.

25 Q. And when you interviewed Mr. Kincaid, did you

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1 speak to him about any specific projects that
2 you wanted him to work on if he came to the
3 bank?

4 A. I don't remember. We probably talked about
5 the loyalty project because at the time it was
6 important to us to change or try to change
7 from a satisfaction measure to a loyalty
8 oriented measure. We probably talked about
9 that, but I don't recall specifically.

10 Q. Okay. All right. And do you recall when it
11 was that Mr. Kincaid started working at the
12 bank?

13 A. I think it was August 19.

14 Q. Okay. 2002?

15 A. Yes.

16 Q. Okay. In preparation for your deposition
17 today have you reviewed any documents? Did
18 you review any documents?

19 A. Yes.

20 Q. What documents did you review?

21 A. His performance reviews, and the overall
22 strategy of our department, and the memo that
23 we delivered to him for his written warning.

24 Q. Okay. I believe that when you referred to
25 performance review you used the plural,

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1 performance reviews?

2 A. Uh-huh (yes).

3 Q. How many performance reviews were there?

4 A. Well, what I'm referring to are all the
5 documents that go with it, so what we call now
6 your, the PYP, the planning your performance
7 documents. They had a different name back
8 then. The Hoshin documents, I think, is how
9 they're probably listed in what we had then.
10 So the goals that he had, and the performance
11 review, and the notes that I had written per
12 our coaching conversations.

13 Q. Okay. And as of August of 2002 did the bank
14 have a practice or a policy as to how
15 frequently it gave employees performance
16 reviews?

17 A. Yes.

18 Q. And what was that policy or practice?

19 A. Quarterly reviews.

20 Q. Okay. Now, Mr. Kincaid started in August of
21 2002, right?

22 A. Uh-huh (yes).

23 Q. And so does that mean that he was due for a
24 performance review in December of 2002?

25 A. Yes.

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1 Q. Did he get a performance review in December of
2 2002?

3 A. Not a formal review, no.

4 Q. Why not?

5 A. We had regular conversations, but I never
6 documented his review that quarter.

7 Q. Okay. And that was contrary to bank policy
8 and practice, right?

9 A. It is.

10 Q. Were there any other employees that you gave a
11 performance review to in December 2002?

12 A. No formal reviews, no.

13 Q. And so there was a departure from normal bank
14 policy and practice not just for Mr. Kincaid,
15 but for other people?

16 A. Yes.

17 Q. Why was that?

18 A. Sometimes things are done late or the formal
19 documentation is skipped.

20 Q. Okay. That wasn't Mr. Kincaid's fault, right?

21 A. That's right.

22 Q. That was your fault?

23 A. That's right.

24 Q. Okay. Now, how frequently did you meet with
25 Mr. Kincaid?

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1 A. We met weekly. We met more often than that,
2 but our regular standing meeting was weekly,
3 so we met at least weekly.

4 Q. Okay. And where was your office physically in
5 relationship to where Mr. Kincaid's office
6 was?

7 A. Down the hall.

8 Q. Okay. Did you see Mr. Kincaid every day?

9 A. Pretty well.

10 Q. Okay. And what kind of feedback did you give
11 to Mr. Kincaid in these weekly meetings in
12 August and September of 2002?

13 A. What kind of feedback?

14 Q. Yes. Was it positive feedback? Negative
15 feedback? Neutral feedback?

16 A. My feedback is always mixed and balanced
17 depending on the performance of the associate.
18 So when he had successes and positive
19 behavior, we discussed those, and if there was
20 something that needed improvement, we
21 discussed that also.

22 Q. You realize, Ms. Burroughs, the way that you
23 just described it is you never give an
24 employee either a positive review or a
25 negative review, it's always mixed?

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1 A. No, sir, that's not true. You asked me about
2 those two months and his feedback was balanced
3 per his performance, which had some positive
4 and some areas that needed to be developed.

5 Q. Okay. The transcript, of course, will show
6 this, but I believe you said I always give
7 balanced reviews to my employees. Do you
8 recall that?

9 A. I do.

10 Q. And did you say that?

11 A. Yes.

12 Q. And does that mean that you can never
13 characterize a review that you've given an
14 employee as either positive or negative?

15 A. In most cases associates have both positive
16 and areas that need to be improved upon,
17 opportunities. And I have not yet had a
18 situation where I had an employee who had all
19 positive or all negative feedback.

20 Q. All right. In these early reviews that you
21 had with Mr. Kincaid, can you give me an
22 example -- well, can you tell me the first
23 negative thing you ever said to Mr. Kincaid in
24 a review?

25 A. No, I cannot.

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1 Q. Why not?

2 A. I don't remember.

3 Q. Can you tell me the first negative thing you
4 said to him in a review that you can remember?

5 A. I can tell you the general theme of the
6 improvement that we were asking for and the
7 areas where we were coaching, yes.

8 Q. All right. Is there some reason why you can't
9 answer my question just the way that I asked
10 it?

11 A. Yes.

12 Q. Okay. You can't answer it the way that I
13 asked it?

14 A. I cannot tell you the first, what you referred
15 to as negative comment I made to Steve, no, I
16 can't tell you that. I don't remember.

17 Q. Now, Ms. Burroughs, that was the question that
18 I asked you several questions ago, and I
19 realize you say that you can't remember the
20 first negative thing you said to him. What
21 I'm asking you now is, tell us what is the
22 first negative thing that you said to him that
23 you do remember.

24 A. Okay, I can tell you that. The thing that I
25 remember that we discussed most often --



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1 Q. No, ma'am.

2 A. Okay. I can't tell you if this was the first
3 thing or not.

4 Q. Ms. Burroughs, this is not rocket science.

5 MR. KANE: Objection.

6 Q. I am asking you --

7 MR. KANE: Objection, rephrase
8 that.

9 Q. -- that the --

10 MR. KANE: I think you owe the
11 Witness some courtesy.

12 MR. FINE: Mr. Kane --

13 MR. KANE: Your suggesting that
14 she is dumbing down by using
15 the term rocket science.

16 MR. FINE: No, what I'm
17 suggesting is what is obvious
18 to you as it will be to anybody
19 who reads this transcript, is
20 that Ms. Burroughs is being
21 very clever and avoiding the
22 questions that I'm asking.

23 MR. KANE: That is not true.

24 MR. FINE: And I --

25 MR. KANE: I invite you to take

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1 that up with the Court. She is
2 not being clever, she's being
3 open and candid and very
4 precise.

5 Q. Ms. Burroughs, do you understand what I mean
6 by a negative comment?

7 A. Yes.

8 Q. Okay. Can you tell us, please, what is the
9 first negative comment you remember saying to
10 Mr. Kincaid?

11 A. Yes. That we need to make sure that we don't
12 just try to apply what has worked elsewhere,
13 but that we have to modify what we're
14 suggesting for the culture and the progress
15 that Bank of America has made in customer
16 satisfaction.

17 Q. Okay. And was there a specific incident that
18 caused you to make that comment?

19 A. Yes.

20 Q. What was the incident?

21 A. Steve had recommended that we change our
22 measurement scale.

23 Q. Okay. And what measurement scale was that?

24 A. For our customer satisfaction marketing
25 research surveys.

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1 Q. Okay. And in what context did he recommend
2 that that be changed?

3 A. We had regular discussions because it was the
4 nature of our department and the mission of
5 our department to discuss ways to enhance the
6 bank's customer satisfaction efforts.

7 Q. Okay. And Mr. Kincaid suggested that this
8 measurement be changed?

9 A. Yes.

10 Q. Okay. And in what form did he suggest that it
11 should be changed? How did he communicate
12 that?

13 A. I recall we were having a conversation.

14 Q. This was a conversation, just you and he?

15 A. The particular one I'm recalling, yes. He may
16 have also mentioned it in a group context.

17 Q. Okay. And what did he say to you and what did
18 you say to him?

19 A. The general nature of the conversation was
20 that he was recommending that we change the
21 scale. What I indicated to him was that
22 although different scales may work better than
23 what we used, we had just spent a quite
24 considerable amount of time changing a number
25 of studies to the scale that we were on.



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1 People were beginning to be incented on it,
2 and communication was happening regarding that
3 incentive. Changing the scale at that time
4 would eliminate all the history that we had,
5 render that incentive not useful, and a lot of
6 confusion, and it was a very clear barrier to
7 making the change that he was recommending.

8 Q. Okay. Now, that wasn't a negative comment
9 about Mr. Kincaid's job performance, was it?

10 A. The message about his performance is that we
11 have to make sure that, as he's coming up with
12 the ways that he is suggesting that we
13 influence the bank on customer satisfaction,
14 it must be tailored to where the bank is. And
15 the improvement for him was to truly
16 understand where the bank was in its progress
17 for customer satisfaction and understand that
18 we have to modify where we would like to see
19 the bank based on where we were starting from.
20 So the coaching for him was, try to understand
21 where we're coming from. Theory is not
22 enough. We have to take the culture that
23 we're dealing with and take that into account
24 as well.

25 Q. Okay. This sounds like it was an exchange of

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1 views that you were having with Mr. Kincaid,
2 right?

3 A. Most of the coaching that we deliver is
4 delivered in such a fashion that it's for the
5 improvement of the associate. That's why I
6 hesitate when you ask me about negative. It
7 depends on who is perceiving something as to
8 whether it's negative or not. From my
9 perspective, it was an opportunity for
10 coaching, which can be translated into it's a
11 negative statement, you should be able to do
12 this.

13 Q. Well, do you regard it as being a deficiency
14 in an employee's performance every time he
15 says something that you disagree with?

16 A. No. The deficiency was his inability to
17 adjust what he was suggesting based on where
18 the bank was in our progress.

19 Q. Well, I had asked you to tell us the first
20 negative thing you ever said to him, right?

21 A. Uh-huh (yes).

22 Q. And you are describing a conversation where
23 he's proposing a change in a measurement, and
24 you're saying to him, no, we can't change the
25 measurement for the following reasons, right?

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1 A. And before you ask us to implement these
2 ideas, you need to make sure that you
3 understand where the bank is today and why
4 these are ideas that can't be implemented in
5 the way you're suggesting, and modify those
6 suggestions so that they can fit where we're
7 headed.

8 Q. Okay. When did you have that conversation
9 with Mr. Kincaid?

10 A. I don't remember specifically.

11 Q. Was it before January of 2003?

12 A. Probably.

13 Q. All right. Now, earlier when I asked you
14 about whether you gave a quarterly review to
15 Mr. Kincaid in December of 2002 you said, I
16 believe, that you gave some review informally
17 to him?

18 A. We had informal review, coaching on a regular
19 basis.

20 Q. Okay. Other than the regular weekly coaching
21 that you gave to him, was there some
22 cumulative conversation that you had in
23 December 2002 in lieu of a written report?

24 A. I don't think we had a conversation that we
25 sat down and labeled as this is the end-of-



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1 year conversation, no.

2 Q. This is the end of --

3 A. End-of-year conversation.

4 Q. Yes, okay. Okay. What is the first positive
5 feedback that you remember ever giving to
6 Mr. Kincaid?

7 A. I'm not sure. I know he did a nice job
8 managing projects early on.

9 Q. Okay. What is the earliest positive feedback
10 that you remember?

11 A. I remember giving him positive feedback
12 regarding a White paper that he wrote on
13 margin of error.

14 Q. And when did he write this White paper on
15 margin of error?

16 A. I don't recall specifically, probably in the
17 fall of 2002.

18 Q. Okay. And was this positive feedback that you
19 gave him with regard to the White paper, how
20 did you communicate that to him?

21 A. Verbally.

22 Q. Was anybody else present?

23 A. I don't remember specifically. Very likely.

24 Q. What did you say to him?

25 A. I don't recall the specific words.

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1 MR. KANE: -- check it later.

2 Q. Okay. Ms. Burroughs, do you recognize what
3 this is?

4 A. Yes.

5 Q. What is it?

6 A. Mr. Kincaid's performance review.

7 Q. Okay. And who drafted the various items in
8 this performance review?

9 A. The business goals were drafted, actually, by
10 Steven and I and my team, and the performance
11 aspects were drafted by me.

12 Q. Okay. The business goals you say were drafted
13 by Steven and the team?

14 A. And me, yes.

15 Q. And you. Okay. And when were they drafted?

16 A. I'm not sure, sometime probably in December.
17 I'm not sure.

18 Q. Okay. And when were they first committed to
19 writing?

20 A. December or January time frame, as we were
21 developing them to prepare for 2003.

22 Q. Okay. All right. And so with regard to what
23 appears in business goals, these were simply
24 copied from a pre-existing document?

25 A. Yes. Well, and incorporated with the last two



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1 pages of what you have here.

2 Q. Okay. All right. Now, if you look at the
3 first page of this, it's got business goal and
4 then it's got description, it says, see
5 attached Hoshin items 1.1 through 1.3.

6 A. Uh-huh (yes).

7 Q. Who composed the, see attached to Hoshin items
8 1.1 through 1.3?

9 A. That particular phrase there, me.

10 Q. Okay. And --

11 MR. KANE: I'm sorry, but I
12 don't know where you are.
13 You're able to read something
14 that I can't. Where is the
15 business goal? Where do you
16 see the words, business goals?

17 MR. FINE: Okay. The first
18 page.

19 MR. KANE: Okay.

20 MR. FINE: Lower left-hand
21 corner.

22 MR. KANE: Okay.

23 MR. FINE: Second column.

24 MR. KANE: It's not in the
25 dark, the really dark section,



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1 it's underneath that, okay.

2 Thank you, I'm with you now.

3 MR. FINE: Okay.

4 Q. Okay. And then going over to the column
5 that's headed, quarterly/year-to-date status
6 and results, see attached.

7 A. Uh-huh (yes).

8 Q. You put in, see attached?

9 A. Yes.

10 Q. Okay. And then the rating where it says, does
11 not meet expectations, whose phrase is that?

12 A. It's a bank phrase that I applied here.

13 Q. Okay. And was this document actually typed?

14 A. (Witness does not respond.)

15 Q. I mean, who typed the document?

16 A. Me.

17 Q. Okay. What does Hoshin item mean?

18 A. Hoshin is a business planning process used by
19 the bank.

20 Q. Okay. And can you describe for us what that
21 business planning process is?

22 A. Yes. Hoshin is a Japanese word meaning
23 compass.

24 Q. Meaning?

25 A. Compass, loosely translated. And the Hoshin

1 kanri process used at the bank establishes
2 business goals at the most high level, the
3 corporate level at the bank, and cascades down
4 to every group and department, and thus, to
5 every associate. So what you see on the
6 attached piece are what we would refer to as
7 the Hoshin goals that were relevant to Steve's
8 contribution to the overall customer
9 satisfaction research team.

10 Q. Okay. Now, going to the last two pages of
11 this document, is it fair to say that what
12 precedes these last two pages is a summary of
13 the last two pages, that the last two pages
14 are a more complete statement of what's
15 referred to earlier?

16 A. For the business goals and results section,
17 yes.

18 Q. When you say business goal and results, what
19 are you referring to?

20 A. The bottom of page one.

21 Q. Okay.

22 A. But the last two pages do not address the
23 strengths and opportunity development needs at
24 the bottom of page 2.

25 Q. Okay. So the last two pages are a fuller



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1 statement of everything up to that section at
2 the bottom of page 2?

3 A. Yes. But I think there's a page missing.

4 MR. KANE: Okay.

5 A. It's more in memo format, not in a formal --

6 Q. Okay. Well, there's another document.

7 A. The one you're stapling is not the one I'm
8 referring to.

9 Q. Okay.

10 A. It's part of the performance plan
11 documentation.

12 MR. KANE: I know what you
13 mean.

14 A. It's a single sheet, white piece of paper. I
15 think it's missing from here because it goes
16 into further detail regarding the strengths
17 and development needs.

18 Q. Okay. (Counsel examines documents.)

19 A. That's it.

20 MR. KANE: That's it.

21 A. Yeah, the one you just went by.

22 Q. Is that the missing page?

23 A. Yes.

24 Q. Okay.

25 MR. FINE: This is a document

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1 that's Bates marked BofA-31.

2 I'd like to have this marked as
3 the next Exhibit.

4 (Whereupon, Plaintiff's Exhibit
5 Number 2 was marked and
6 identified for the record.)

7 Q. Okay. Ms. Burroughs, if you could pass me --
8 that's the only copy of that I have for the
9 moment.

10 A. (Witness hands document to Counsel.)

11 MR. KANE: Why don't we have
12 copies made?

13 MR. FINE: Yeah.

14 MR. KANE: It won't take long.

15 MR. FINE: Yeah.

16 MR. KANE: What time is it?

17 MR. FINE: It's 3 o'clock.

18 Should we take a break?

19 MR. KANE: Yeah, a short one.

20 A. That would be good.

21 (Whereupon, a short recess was
22 taken from 3:00 p.m. until
23 3:07 p.m.)

24 Q. Okay. The document that has been marked as
25 Exhibit 2, can you just tell us where in the

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1 document that was marked as Exhibit 8 in
2 Mr. Kincaid's deposition, where should it be
3 inserted?

4 A. Uh-huh (yes). After page 4, between the part
5 that says, performance plan and evaluation
6 form, and before the last two pages that are
7 the performance plan.

8 Q. Okay. It's after the fourth page in the
9 Exhibit, although actually, the fourth page
10 has 3 of 3 on it?

11 A. Right.

12 Q. Okay.

13 A. Yes.

14 Q. Okay. And then actually, why don't I place
15 before you a copy of what was marked as
16 Exhibit 9 in Mr. Kincaid's deposition?
17 (Counsel hands document to Witness.) Okay.
18 Now, were all of these documents, what had
19 been marked Exhibit 8, the inserted page, and
20 what was marked as Exhibit 9, were they all
21 given to Mr. Kincaid on April 16 of 2003?

22 A. I don't think so.

23 Q. Okay. So what was given to him when?

24 A. I believe the performance plan, so what is
25 referred to as Exhibit 8 and 2, or discussed a

1 few days prior to what is labeled as
2 Exhibit 9.

3 Q. Okay. And was there -- what was the reason
4 why the one set of documents was given to him
5 a few days before and then this other document
6 was given to him on the 16th? I mean, was
7 there any reason?

8 A. No, not really.

9 Q. Okay. So essentially, all of these documents
10 together were a part of this evaluation?

11 A. No, Exhibit 9 is not part of the evaluation,
12 Exhibits 8 and 2 is the evaluation.

13 Q. Okay. What is Exhibit 9?

14 A. Exhibit 9 is the formal written counseling
15 regarding lack of performance.

16 Q. Okay. Please explain what's the difference
17 between those two things.

18 A. Exhibits 8 and 2, the performance evaluation,
19 is the process, the quarterly process for
20 delivering the feedback to the associate.
21 Exhibit 9 is a further step in terms of
22 counseling the associate for lack of
23 performance.

24 Q. Okay. So which of these documents was, should
25 have been of more concern to Mr. Kincaid, or

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1 were they both equally of concern or should
2 they have been of equal concern to him? The
3 question may not be clear.

4 A. I think they should have been of equal concern
5 to him because the message they both convey to
6 him is that he's not meeting expectations.

7 Q. Okay. So now, going to Exhibit 8 and
8 Exhibit 2, how should an employee go about
9 reading this document? What's the right way
10 to read it?

11 A. (Witness does not respond.)

12 Q. Do you understand my question?

13 A. I'm dying to say left to right, but I'm not
14 thinking that's what you mean.

15 Q. No, no. Speaking for myself, this document is
16 a little bit difficult for me to get oriented
17 into.

18 A. Okay. Maybe this will help you. It's not
19 intended to be thrown at an associate and walk
20 away and let them handle it on their own.
21 This is a template that we use for a
22 discussion. So the right way for an associate
23 really to read it is with their supervisor in
24 conversation.

25 Q. So do you recall how you talked to

1 Mr. Kincaid, how you talked him through this
2 document or what your practice was in talking
3 employees through a document like this?

4 A. What we would have done is to talk through
5 each of the business goals because those are
6 familiar to him already, what his rating was
7 for those, why the rating was as it was. In
8 this case, does not meet, so what was the
9 deficiency in those; for those that are meets,
10 you know, what's going well. And on the ones
11 that are does not meets, there's typically
12 components that are handled okay, so it's a
13 balanced conversation regarding what is okay
14 here and what needs to be improved.

15 Q. Okay. I think you testified earlier that does
16 not meet expectations is a bank rating?

17 A. Yes.

18 Q. Okay. So what are the other possible ratings
19 in this scale?

20 A. Meets expectations or exceeds expectations.

21 Q. Okay. So it's essentially a three-part scale?

22 A. Yes.

23 Q. Okay. Right. Now, in talking Mr. Kincaid
24 through this document, what would you have
25 focused on first?

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1 A. (Witness does not respond.)

2 Q. I mean, for example, would you have started
3 with a customer satisfaction research
4 performance plan or would you have started
5 with this overall rating or would you have
6 done both of them together, how would you --

7 A. We likely would have done both of them
8 together. And the relevant parts of this one
9 that you're referring to, the performance plan
10 with the three columns on it, is the Q1 2003
11 results. Because the first column was all
12 familiar to Steve already, so we didn't do a
13 ton of review about what's in there, simply
14 that organizes the conversation about what's
15 in the second column.

16 Q. Okay. In your view, what part of this
17 document, 8 and 2, is the most informative to
18 the employee, of greatest usefulness to the
19 employee and to you in giving your review, if
20 there is one part?

21 A. Well, the ratings are typically useful because
22 that does give the associate the understanding
23 of where they stand. The discussion regarding
24 what has been the result and the strengths and
25 opportunities are also important. The



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1 strengths and development needs are used as a
2 very important discussion topic of the
3 associate.

4 Q. Okay. And you said opportunities. Is there a
5 heading that says opportunities?

6 A. You know what, the form changes so often.
7 Probably not. I think this time it says,
8 development needs.

9 Q. Okay. All right. So starting then on page 1
10 with the business goals and the rating, with
11 regard -- there are six items here and you've
12 given a rating of does not meet expectations
13 on five of the six of them.

14 A. Right.

15 Q. Okay. Now, with regard to the one topic where
16 you've given him a rating of meets
17 expectations, can you explain what it was that
18 he met expectations on?

19 A. Right. And actually, and maybe this is what
20 you asked me earlier, the sections in 2.1.1
21 are less relevant than the sections in, it was
22 really the first 1, 2, 3 on page 1.

23 Q. Okay. And --

24 A. The Hoshin plan is split into three sections,
25 customer, associate, and shareholder.



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1 A. Again, you use all of it together to
2 facilitate one holistic discussion about
3 performance. And it doesn't have to be quite
4 as structured as the way you're asking. All
5 of it supports the overall, here's what we
6 asked you to do, which is the what, and here's
7 how well you did it in terms of the way you
8 went about it.

9 Q. Okay; okay. All right. So now, going back
10 here to number one on this page, so now, these
11 are the goals that Mr. Kincaid would have
12 known about beforehand?

13 A. Yes.

14 Q. And then you've got three result items?

15 A. Yes.

16 Q. Okay. And 1.1, you say, has not yet provided
17 analysis across studies.

18 A. Right.

19 Q. Is that your critique of his performance with
20 regard to that goal?

21 A. Yes.

22 Q. Okay. All right. So now, what did you mean
23 by that?

24 A. The goal was to provide analysis across
25 various studies, so taking the results from



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1 more than one study, integrating them and
2 synthesizing them into an overall analysis,
3 and that had not been done.

4 Q. Okay. And then immediately across from that
5 is a metric?

6 A. Yes.

7 Q. What does that mean?

8 A. The metrics are there, it's more oriented, the
9 format, for jobs that are more quantitative in
10 nature than the jobs that we did. In order to
11 try to use the format that the bank uses, we
12 applied metrics. So the metric there for that
13 one, for lack of a better metric, is a number
14 of unique analysis papers that we developed
15 and delivered to the business.

16 Q. Okay. And analysis papers meaning analysis
17 across studies?

18 A. Right, regarding the synthesizing of that
19 information across studies.

20 Q. Okay. All right. So now, is this something
21 that you said also to Mr. Kincaid orally, that
22 you made this particular criticism?

23 A. You're referring to the middle part?

24 Q. Has not yet provided analysis across studies.

25 A. That would not have been the primary, not of

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1 the entire -- wouldn't have been the most
2 impactful part of the conversation. I can't
3 remember, we probably touched on it because we
4 touched on all the pieces, but that wasn't the
5 primary consideration for him.

6 Q. Okay. What was the primary consideration?

7 A. The primary consideration, actually, was what
8 is in Exhibit 2 and is in the influencing
9 pieces and the leadership pieces that were
10 missing from the performance.

11 Q. Okay. All right. So are you saying that
12 really the heart of the criticism was what's
13 on Exhibit 2 under leadership and
14 consulting/influence?

15 A. And strategic thinking and initiative/project
16 value, yes. The heart of it is there; not the
17 totality, but the heart of it.

18 Q. Heart of it, okay. All right. So now let's
19 go to the leadership section of that. Okay.
20 And the first thing you say here is, needs to
21 identify improvement opportunities and
22 proactively show initiative to figure out how
23 to get them down. Okay. And then you
24 reference the Hoshin goals. Okay.

25 When you discussed this with Mr. Kincaid,

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1 did you talk with him about specific
2 opportunities that you thought he had missed?

3 A. Yes.

4 Q. Okay. Can you give me an example of one such
5 that you talked to him about?

6 A. Actually, yes. Although it wasn't something
7 that he had actually shown initiative to get,
8 it was actually a task that I needed to get
9 done. But I had asked him to pull out all of
10 the key drivers from each of the various
11 studies and create something that we could
12 show management that shows the synergies and
13 the gaps between what are similar and what are
14 different across studies. He was not able to
15 deliver that.

16 Q. Okay. When is the first time that you had
17 asked him to do that?

18 A. I don't remember.

19 Q. Okay. When you made this particular
20 criticism, did he make any response?

21 A. I don't remember.

22 Q. Okay. All right. Then the next thing under
23 leadership you say, after seven months, still
24 unable to work the organization. And then
25 below that, should be linking the loyalty

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1 project to Valuation work.

2 Okay. Was should be linking the loyalty
3 project to Valuation work, was that an
4 illustration of how you were saying he wasn't
5 able to work the organization?

6 A. Yes.

7 Q. Okay. Can you elaborate more on what you told
8 him on the subject of his being unable to work
9 the organization?

10 A. Yes. At his level and in the function that we
11 provided, what we required and what we needed
12 was for him to develop relationships with all
13 the various constituents that we worked with
14 and making linkages between projects and
15 ensuring that the right people were involved
16 in the right way in the right places, so
17 learning very quickly who's who, what their
18 function is, how they interact with the work
19 that we do. Just one example is including the
20 appropriate finance folks with the loyalty
21 development work and the Valuation work
22 knowing that -- he should have been able to
23 see that those studies, the projects, the
24 initiatives needed to be linked, ensuring that
25 we had an early buy-in and early input from



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1 all the right people, figuring out who those
2 people were, and going to them and getting
3 their involvement and their buy-in to the
4 process.

5 Q. Okay. And this was something that you
6 discussed with him?

7 A. Absolutely, more than once.

8 Q. Okay. When was the first time that you
9 recalled discussing that problem with
10 Mr. Kincaid?

11 A. I can't remember when he specifically started
12 the loyalty work. It would have been in the
13 beginning stages of that project, and I can't
14 remember specifically when it started.

15 Q. Okay. Do you remember anything else about the
16 discussion that you had with Mr. Kincaid on
17 this particular aspect?

18 A. On the leadership?

19 Q. Right.

20 A. The working the organization?

21 Q. Right.

22 A. Well, there also was the, what we now refer to
23 as socializing of the key driver standards.

24 It was difficult to get the standards
25 approved. Steve was very passive in that



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1 process and, again, unable to work the
2 organization, unable to influence the people
3 that he needed to get action from and interact
4 with them in such a fashion that he get a
5 result.

6 Q. Okay. And did he say anything in response to
7 your criticism on that subject?

8 A. I know that he also was frustrated that it
9 didn't get done faster. So the discussion, as
10 I remember it, is along the lines of, you
11 know, what else -- yes, it was frustrating, it
12 took forever, nobody would do anything for me,
13 nobody would respond.

14 Q. Okay. And you're saying, in essence, look, if
15 you were doing more of what you should have
16 been doing, you would have been able to get
17 those people to come along?

18 A. Yes.

19 Q. Okay. Did you talk about any specific people
20 in that discussion?

21 A. We may have, I don't remember. We likely did,
22 I don't remember.

23 Q. Okay. Is there anything that, anything else
24 significant that you remember about your
25 discussion with Mr. Kincaid on the subject of



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1 leadership?

2 A. No.

3 Q. Okay. All right, now --

4 A. Well, no.

5 Q. Okay. Going down to consulting/influence,
6 okay, you say, has not shown ability to lead
7 the valuation topic.

8 A. Uh-huh (yes).

9 Q. What did you say to Mr. Kincaid on that
10 subject?

11 A. The idea there was that Steve should have been
12 the primary driver of the strategic thinking
13 of what needed to be done to prove the value,
14 if you will, of customer satisfaction. There
15 was a team that had begun to look at that
16 particular topic. He should have been an
17 integral member of that team, he should have
18 shown his value to that team early on and
19 ultimately been the leader of that entire
20 effort. But his approach was very passive and
21 very disengaged from that process, and so he
22 never was able to even be a full participating
23 member of that team, let alone lead the
24 effort, which is what the intention had been.

25 Q. Okay. And did he say anything in response to

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1 that criticism?

2 A. I don't remember.

3 Q. Okay. Then the next point is, does not get
4 along well with other statisticians/does not
5 work through issues well.

6 What did you say to him on that subject?

7 A. That was, well, none of these were a new
8 subject for us so the theme of that
9 conversation, as well as all the previous
10 ones, was his interactions with Rick McFarland
11 and the fact that between the two of them,
12 they should have really created some
13 incredible synergy based on the fact that
14 their philosophies were very similar. But
15 unfortunately, they really did not do well
16 collaborating together.

17 Q. Did you yourself have any problems with Rick
18 McFarland?

19 A. From time to time.

20 Q. And what kinds of problems did you have with
21 him?

22 A. Ensuring that we were not having our groups,
23 actually each of us doing similar work without
24 collaborating on it. Stepping on each others'
25 toes, essentially.

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1 and the strategic leadership in terms of where
2 those things needed to go.

3 Q. Okay. In your discussion of the three topics
4 we've covered so far, the leadership, the
5 consulting/influence, strategic thinking, did
6 you ever get to the point of talking to
7 Mr. Kincaid about specific steps that he
8 should do to improve his performance in those
9 areas?

10 A. Yes.

11 Q. Okay. Can you identify any of those steps?

12 A. I can tell you what they would have been.

13 Q. Sure.

14 A. On any particular project, who needed to be
15 involved, set this meeting up. On the
16 particular task regarding the developing the
17 key drivers, I have all the studies, make four
18 columns, one for each study, and list out -- I
19 mean, some of them had -- I increasingly got
20 where I needed to spell out for him each step.
21 Other areas I did not need to. Project
22 management for research projects, I did not
23 have to become involved in that way. Anything
24 outside of that, I had to become involved very
25 fully.

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1 Q. Okay. And when you describe specific steps
2 for Mr. Kincaid to take, did he take those
3 steps?

4 A. I would recall that most of the time he did.

5 Q. Okay. Right. Going down to
6 initiative/project value, the first bullet is,
7 needs to execute projects from conception to
8 completion.

9 What did you say to Mr. Kincaid on that
10 subject?

11 A. I don't have the specific words, but the
12 sentiment of it is that he should have been
13 able, at that level, to handle those types of
14 projects without any interaction from me.
15 That with the general direction, the vision of
16 what we were trying to get, he should have
17 been able to include the right people, create
18 the right vision, create the right task plan
19 on his own, carry that task plan out from the
20 beginning of that project on his own through
21 to where the business need that it was filling
22 was filled.

23 Q. Okay. And can you give us a specific project
24 where he didn't do that right?

25 A. Yeah. The identification and the creation of



1 the analysis that showed the gaps in the key
2 drivers from one study to another is one of
3 those.

4 Q. Okay. Can you explain that a little more?

5 A. Uh-huh (yes). There were a number of customer
6 satisfaction studies done for different
7 product areas, different channel areas. Each
8 of them had their own, what we call key
9 drivers, those elements that are important to
10 that product or that channel for satisfaction.
11 There are elements of similarity and elements
12 of differences across those. Our job as a
13 group was to synthesize information and create
14 the overall picture, the overall view at the
15 corporate level. The project was, or the
16 task, really, was to review all those studies,
17 and it is clearly spelled out in each one what
18 those elements are that drive satisfaction,
19 and compare what drives satisfaction in a
20 particular product or channel area across all
21 the products and channels to determine at the
22 overall level what are the similar drivers and
23 what are the drivers that are unique to a
24 product or channel, and then synthesizing that
25 in a way that senior management could

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1 understand and use it.

2 Q. Okay. And so you felt that Mr. Kincaid hadn't
3 done that the way that you thought he should?

4 A. Right.

5 Q. Okay. Can you give me an example of a product
6 and a set of drivers, so to speak?

7 A. Yes. A credit card.

8 Q. Okay.

9 A. Those elements that drive a person's
10 satisfaction with their credit card, things
11 like fees, how many places they can actually
12 use their credit card. Various aspects of the
13 features and service they receive with the
14 card would be drivers.

15 Q. Okay. And so what you thought that
16 Mr. Kincaid should be able to do is to compare
17 and integrate his analysis of drivers for
18 credit cards with drivers for other products?

19 A. Right. And keep in mind, it's a fairly simply
20 task because each of those drivers were
21 already identified in the work done by the
22 other areas. All that we really had to do
23 with it -- so it's a very simplistic and a
24 very -- it's not a senior level task to do
25 this, it's not rocket science, if you will --

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1 is to take each of those lists, understand
2 what is on each one of them, so understand the
3 nuances of what fees means in checking versus
4 if you have fees or service means in one
5 versus another, do the analysis that shows
6 these are the ones that are the same, these
7 are ones that show up more than one time,
8 these are ones that only show up in this
9 place. This is how the channels, which is the
10 way you access the bank, are different from
11 the products. And creating that in a simple
12 presentation that senior management could then
13 understand and use.

14 Q. Okay. And when you gave this criticism to
15 Mr. Kincaid, did he say anything in response?

16 A. I don't remember. He probably did because it
17 was a discussion we were having.

18 Q. Okay. If you'll look at the next bullet
19 point, needs to take nugget of topic and
20 expand it to be useful beyond the step-by-step
21 tasks.

22 What was your discussion with Mr. Kincaid
23 on that subject?

24 A. The idea that it really was that I was having
25 at that point to indicate to him here's what

1 you need to do. He wasn't able to take the
2 vision of what we needed to get accomplished
3 and figure out how to get it done. And so,
4 what I needed for him to be able to do in the
5 senior and strategic capacity that our group
6 worked at was to be able to understand, based
7 on the mission of our group and the topic that
8 we were talking about, figure out what to do,
9 how to get it done, who to include, and go and
10 get that done. He was not able to do that.

11 Q. Okay. All right. And then if you go to the
12 third bullet point, needs to be able to
13 identify all the steps needed and then execute
14 them to add value; currently needs too much
15 assistance at each step.

16 A. Right.

17 Q. What was your discussion?

18 A. Similar message.

19 Q. Pardon?

20 A. Similar message. And again, within a -- the
21 projects that he ran from a marketing research
22 project perspective, this criticism is not
23 relevant to that. Our group did very little
24 in terms of project management. We weren't in
25 the research group at the time that it was

1 developed. And what our job was was not that
2 type of project, but these projects that were
3 outside of that in terms of develop key driver
4 standards, figure out how to make sure that
5 they get socialized and properly enforced
6 within the bank, do the analysis across
7 existing studies to determine where are there
8 areas of synergies and where are there areas
9 of uniqueness. And so it was those types of
10 projects that, and those types of initiatives
11 that he was not able to add the value to.

12 Q. Okay. Now, if you go to the part of this
13 document that's been marked Exhibit 2 that's
14 headed contributions, all right, the first is,
15 develop new standard key driver methodology.

16 A. Yes.

17 Q. Can you explain what that was?

18 A. Yes. All these various studies that I refer
19 to where we had a product area or a channel
20 where we wanted to determine what drove
21 satisfaction for those, previously, all the
22 various areas doing that research on their own
23 did their analysis in their own way. None of
24 them were necessarily wrong, but some of them
25 could be -- they weren't necessarily --

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1 Q. Okay. And don't you also recognize now that
2 if you didn't find out about that letter that
3 Mr. Kincaid's lawyer wrote to the bank, that
4 was certainly not Mr. Kincaid's fault?

5 A. It is not Mr. Kincaid's fault that the general
6 counsel did not send it to me, that is
7 correct.

8 Q. Okay. And the general counsel should have
9 sent it to you, right?

10 A. I'm not familiar with their practices but,
11 yes, I think that they should have sent it to
12 me.

13 Q. Well, is there any doubt in your mind about
14 that?

15 A. No. Ultimately, as the investigation should
16 have started, I should have been involved in
17 that, yes.

18 Q. Right. It's absolutely clear, once the bank
19 got that letter, you should have been notified
20 about it and should have been notified about
21 it right away, right?

22 MR. KANE: Objection.
23 Speculation. What should have
24 happened? She didn't agree --
25 she's told you that she doesn't

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1 Q. Okay. And do you also understand that part of
2 the claim that he is making is he was
3 terminated in retaliation for requesting an
4 investigation of whether there was
5 discrimination against him; do you understand
6 that?

7 A. I had seen that in one of the documents, yes.
8 I didn't understand it, given that I couldn't
9 have retaliated since I didn't know he had
10 brought any kind of action.

11 Q. Okay. But you understand that Mr. Kincaid is
12 making that claim?

13 A. Yes.

14 Q. Okay. And so do you understand that one of
15 the issues in the case is your motives for
16 acting as you did? Do you understand that?

17 A. Yes.

18 Q. Okay. And part of what could reasonably be
19 involved in assessment of your motives is the
20 degree of your sensitivity to issues of
21 discrimination. Do you understand that?

22 A. Yes.

23 Q. Okay. Now, as a barometer of your sensitivity
24 to issues of discrimination, do you have any
25 doubt in your mind that once Mr. Kincaid's

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1 responded to Debra Norcross's, Mr. Kincaid's
2 attorney's first letter, he said, from now on,
3 Ms. Norcross, I want you to be in touch with
4 me, Eric Montgomery? Are you aware of that?

5 A. No.

6 Q. I show you what's been marked as Exhibit 2 in
7 Mr. Montgomery's deposition. Turn to the
8 second page of that document, you'll see a
9 letter that Mr. Montgomery sent. I ask you to
10 read that letter to yourself.

11 A. (Witness examines document.)

12 Q. Did you ever see that letter before today?

13 A. No.

14 Q. Do you believe that Mr. Montgomery should have
15 sent such a letter to Mr. Kincaid's lawyer?

16 A. (Witness does not respond.)

17 Q. Do you have any view about that?

18 MR. KANE: Are you suggesting
19 that this letter -- well,
20 strike that. Go ahead.

21 A. Yeah.

22 Q. Reading the letter now to yourself, it's a
23 short letter, right? It's only what, six,
24 seven, eight lines. Do you see anything
25 inappropriate about that letter?



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1 Q. You thought that it was integral to the
2 operation of your group, right?

3 A. It was.

4 Q. Okay. Who did you get to replace Mr. Kincaid
5 after you terminated him?

6 A. Actually, I was not there after that and so I
7 do not know.

8 Q. Well, you didn't say you didn't know in your
9 answers to interrogatories, did you?

10 A. I don't believe that anyone was hired to take
11 on Steve's work.

12 Q. Okay. Now, how is that possible if what
13 Mr. Kincaid was doing was so integral to the
14 operation of your group? How is it possible
15 that you terminated him and then no one was
16 hired to take over his responsibilities?

17 A. Well, clearly, when there was not a project
18 manager to do the work and I was no longer
19 there to direct the work, the work at that
20 time was not, apparently, deemed a priority by
21 the folks that remained.

22 Q. When is the first time that you had a
23 discussion with anybody about your leaving the
24 group that you were in?

25 A. I don't remember.

Overall Rating: Needs Improvement/Does Not Meet Expectations

Contributions:

- Developed new standard key driver methodology
- Developed plan for loyalty measurement identification and completed qualitative phase
- Developed plan for retention driver analysis and began qualitative phase
- Coordinated Client Managed sample plan team

Has not met expectations of job given his level in the following areas:

Leadership

- Needs to identify improvement opportunities and proactively show initiative to figure out how to get them done
 - Hoshin goals 1.1.1, 3.1.1, 3.2
- After 7 months still unable to work the organization
 - Should be linking the loyalty project to Valuation work

Consulting/Influence

- Has not shown ability to lead the valuation topic
- Does not get along well with other statisticians/does not work through issues well

Strategic thinking

- Should be able to develop strategies and suggest approaches to team – to date has not done so

Initiative/Project Value

- Needs to execute projects from conception to completion
- Needs to take nugget of topic and expand it to be useful beyond the step by step tasks
- Needs to be able to identify all the steps needed and then execute them to add value; currently needs too much assistance at each step



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN R. KINCAID,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION,

Defendant.

CIVIL ACTION NO.
04-11522-WGY

COPY

D E P O S I T I O N

OF

SHEILA BURROUGHS (VOLUME II)

At Charlotte, North Carolina

June 2, 2005

Reporter: Christine A. Taylor
Notary Public



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Also Present: Steven Kincaid

* * * * *

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(Exhibits attached to transcript.)

1 A. In my opinion, absolutely nothing.

2 Q. So what's it doing in here?

3 A. I don't know.

4 Q. So it appears to you that either Mr. Ackermann is
5 mistaken here or he knows something that you
6 don't know?

7 A. No, not at all, because I don't believe he's
8 indicating that they're linked. That was your
9 interpretation.

10 Q. Well, this is an affidavit that's being submitted
11 in this case; right?

12 A. (Witness nodded head.)

13 Q. And this case involves Mr. Kincaid; right?

14 A. Yes.

15 Q. Mr. Kincaid was terminated on June 13, 2003?

16 A. Right.

17 Q. What's the decision to disband the Customer
18 Analysis Modeling & Research department have to
19 do with Mr. Kincaid?

20 A. I don't know. In my opinion, nothing.

21 Q. So would you agree with me that the appearance of
22 this statement in this affidavit is a mystery?

23 A. I was not involved in the creation of this
24 document. So everything in that document would
25 be a mystery for me. I don't know why it's

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN R. KINCAID,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION,

Defendant.

C.A. No. 04CV11522 WGY

AFFIDAVIT OF SHEILA K. BURROUGHS

I, Sheila K. Burroughs, being first duly sworn, depose and state as follows:

1. I am over eighteen (18) years of age, have personal knowledge of the facts herein, and am competent to testify.
2. I am currently employed by Bank of America. I have been employed at Bank of America (the "Bank") in Charlotte, North Carolina, since 1989. I was Steven R. Kincaid's ("Plaintiff" or "Mr. Kincaid") supervisor during the time he was employed at Bank of America from August 2002 through June 13, 2003.
3. I was responsible for hiring Mr. Kincaid in August 2002 to the position of market information manager for the customer satisfaction group, and I also made the decision to terminate him in June 2003 for performance reasons.
4. Market information manager is a job title used across various groups within the marketing function at the Bank and can mean different things to different groups.
5. My group, which had four employees, was called the customer satisfaction group and operated within the marketing department. Specifically, customer satisfaction was

concerned with measuring the satisfaction of the Bank's customers across its various lines of business, interpreting those measurements in the context of the Bank's various businesses, and consulting with and advising the senior managers of the Bank as to ways they could increase the level of satisfaction and loyalty felt by the Bank's customers, thereby increasing the Bank's revenues.

6. The customer satisfaction group was doing something new at the Bank. Prior to our formation, the Bank had individuals in each line of business and in marketing who were concerned about the level of customer satisfaction in their particular customers. Ultimately, the customer satisfaction group filled a gap within the Bank's marketing function by looking at the data collected from various products or business lines (e.g. credit card customers, checking account customers, branch banking customers, etc.) and comparing them to each other to create a picture of the whole customer. The customer satisfaction group gave formal recognition to the fact that the Bank's customers were customers across various lines of business and didn't separately think about their satisfaction with one part of the Bank or one particular Bank product. Instead, how a customer felt about her checking account could affect how she felt about her Bank credit card and ultimately about all of her interactions with the Bank.

7. The customer satisfaction group was charged with identifying opportunities to increase customer satisfaction by looking at the whole customer relationship, rather than focusing on one particular aspect of the relationship. For example, the customer satisfaction group cared how branch customers felt about fees and how credit card customers felt about fees and whether branch banking customers felt the same or differently about fees. With this information, we could advise the Bank as to how the

actions and changes made in one area of its business might affect its customer relationships, positively or negatively.

8. Customer satisfaction was not a research project group. Instead, we were expected to set standards for measuring customer satisfaction, interpret research, identify the important and significant findings, translate those findings into concrete suggestions in the form of strategies that the Bank could use to increase customer satisfaction and effectively communicate this information to the senior business executives within the Bank and influence their decision making to get their approval, or buy in, to implement our strategies within the lines of business.

9. At the time I hired Mr. Kincaid, I was looking for someone who could manage, direct and lead the customer satisfaction measurement effort and act as an effective in-house consultant to the lines of business we supported. Based on Mr. Kincaid's resume, his interviews with me and others and the information I had from the recruiter, I believed that Mr. Kincaid had these attributes.

10. Once Mr. Kincaid started with the Bank, I discovered that he was a much more passive individual than I had expected, and more passive than the job required. Although he was a good market research project manager, that was not the job he was hired to do. The job he was hired to do required that he take a leadership role within the Bank's business organization, that he network with individuals responsible for customer satisfaction across the Bank's organization and that he take the reigns of his area of responsibility.

11. In my role as his supervisor, I assisted him to develop the goals for his position. I expected that he would seek out the senior executives of the lines of business we

supported and he would make the connections that were essential to his success in his position. In my observation, Mr. Kincaid simply did not do this.

12. One example of his failure to do this was his lack of significant active participation in a group that was dedicated to issues related to customer satisfaction. In order to facilitate communication across the Bank on customer satisfaction issues, I had established a community of practice, or interest group, related to customer satisfaction. Many of the same key individuals that I expected Mr. Kincaid to consult with and influence as part of his job were active members of this community of practice. We held our meetings monthly, and at the meetings we would share ideas about customer satisfaction and discuss experiences we had had in the past in order to try to learn from these experiences or to take our ideas to the next level. Although I encouraged Mr. Kincaid to become an active member in this group and even hoped that someday he would take over leadership of this group from me, he was apathetic about his participation. He did not come to some of the meetings, and at those he did attend, he was often very passive and had very little to contribute and share with the other members.

13. Similarly, Mr. Kincaid was a member of the Bank's valuation team, which was charged with demonstrating the value of customer satisfaction, but he did not take the active role on the team that I expected him to take. He should have been a leader of this team. Instead he performed tasks, when asked, but remained very passive with respect to leading and motivating this team.

14. In addition to not demonstrating the leadership necessary to be effective in his position, Mr. Kincaid also seemed not to understand the Bank's culture and the context within which we were working. While there might be 100 rights ways to do something,

we were charged with choosing the way that was right for the Bank in the context of its business organization and culture and the real barriers we might encounter. Mr. Kincaid did not seem to see this bigger picture at times. For example, Mr. Kincaid suggested that we change the scale that we were using in our customer satisfaction surveys. Mr. Kincaid failed to appreciate the fact that we had already invested a great deal of time, effort and expense in developing a standard survey scale to be used across the Bank's lines of business and that we had already collected a substantial amount of data using our standard scale. His suggestion would have rendered past survey data obsolete for our purposes. I would have expected that Mr. Kincaid would not suggest changing the standard scale, given the natural and obvious consequences of such a change.

15. In order lead and influence people, I expected some very basic actions by Mr. Kincaid. For example, I expected that he would be able to call a meeting, prepare an agenda for a meeting and lead the meeting. I did not see him do this as I expected of him. An example of when he did not do this, was with respect to standards he had developed for surveys. He proposed the standards to the key executives, but failed to follow through and get them to buy-in to the standards. I recall him telling me that he had distributed the standards and had not heard back from anyone. What he should have done was reach out to the executives, hold a meeting, lead them through a discussion of the standards and gain their approval. Instead, my supervisor and I had to reach out to the executives and get their buy-in and agreement on the new standards. In my observation, Mr. Kincaid did not perform the follow through that was necessary on this project.

16. A lack of follow through was a recurring issue with Mr. Kincaid's work. For example, I had asked him to analyze the key drivers, or most important factors, to

customer satisfaction across the Bank's business groups. I expected him to list the key drivers and provide an analysis of how those drivers were similar and not similar for the different business lines. In this way, I had hoped to get a clearer picture of our whole customer. Mr. Kincaid was able to identify the drivers, but he could not prepare an analysis that would communicate the information in an effective and meaningful way. Ultimately, I assigned a more junior person, Allison Hart, to complete this project.

17. I also did not see Mr. Kincaid build relationships with the key executives in the Bank that he was supposed to be influencing. For example, on one project for the valuation team, he identified an individual, Mindy Felcman, as his contact in the area of finance. What should have been obvious to him was that Kathryn Little was the finance executive in the customer satisfaction area, not Ms. Felcman. It was fine to include Ms. Felcman. Her participation would not detract from the project, but Kathryn Little, who was already an active member of the valuation team, was the person he should have identified as the key individual for the project.

18. Throughout his employment with the Bank, I met with Mr. Kincaid to discuss his work and his performance. In these meetings we discussed the projects he was working on, the goals for his work and his progress in meeting his goals.

19. In October or November 2002, after only a couple of months with the Bank, I rated Mr. Kincaid as a solid performer based on the tasks he had done. At this time, I had hoped that he would have been rated higher than "solid."

20. In April 2003, I rated Mr. Kincaid as "needs improvement" in his first quarter performance evaluation. Also, I gave Mr. Kincaid a written performance warning related

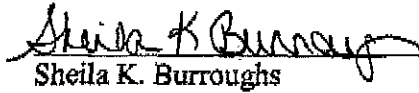
to the areas he needed to improve. He and I discussed each area in detail during our weekly meetings.

21. Although Mr. Kincaid seemed sincere in his desire to improve his performance, he did not demonstrate significant improvement in his performance following the written performance warning.

22. On June 13, 2003, I terminated Mr. Kincaid's employment with the Bank.

23. At no time prior to terminating Mr. Kincaid did I learn that he had made any claims or complaints to the Bank that my criticisms of his performance were motivated by age discrimination.

Signed under the penalties of perjury,


Sheila K. Burroughs

10/20/05